No. 79-172

In the Supreme Court of the United States

OCTOBER TERM, 1978

DON BURGESS CONSTRUCTION CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 596 F. 2d 378. The decision and order of the National Labor Relations Board (Pet. App. C1-C13, D1-D32) is reported at 227 N.L.R.B. 765.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B10) was entered on June 8, 1979. The petition for a writ of certiorari was filed on August 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the carpenters employed by petitioners constituted a single appropriate unit for collective bargaining and that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to apply the collective agreement to all carpenters in the appropriate unit

2. Whether the Board properly tolled the six-month limitation period of Section 10(b) of the Act because petitioners concealed facts showing a violation of the Act from the charging party.

3. Whether the Board abused its discretion by refusing to reopen the record to consider additional evidence proffered by petitioners some six-months after the close of the hearing in the case.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> Section 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

STATEMENT

1. Petitioner Don Burgess Construction Co. ("Burgess Construction") was signatory to the 1971-1974 multiemployer collective bargaining agreement with the Sequoia District Council of Carpenters (herein "the Union") which expired on June 15, 1974 (Pet. App. D3). In early August 1974, Donald Burgess and Verlon Hendrix, who was then employed as Burgess Construction's foreman, formed petitioner V&B Builders (V&B) (Pet. App. D3, D8). Thereafter, all Burgess Construction carpenters were transferred to V&B's payroll and Burgess Construction ceased employing carpenters (Pet. App. D8). Burgess Construction functioned as a general contractor subcontracting work to V&B, which operated almost exclusively on subcontract from Burgess Construction (Pet. App. D4).

On August 6, 1974, Union business agent John Horn approached Burgess at one of Burgess Construction's jobsites and requested that Burgess sign the 1974-1977 multiemployer agreement. Burgess replied that Burgess Construction was not interested in signing the agreement as it no longer employed carpenters, and that the carpenters working on the project were now employed by V&B. When Horn asked whether V&B would sign the agreement, Burgess stated that he would discuss the matter with Hendrix. Later that day, Burgess signed the new multiemployer agreement on behalf of V&B (Pet. App. D3-D4, D12).

In October 1974, Burgess wrote the Union stating that Burgess Construction "is not signatory to your agreement. If you feel you have recognition, please contact me." The Union immediately responded by calling Burgess to determine whether he denied signing the current agreement. Burgess replied that all his carpenters were on V&B's payroll and that Burgess Construction would not be employing carpenters. This satisfied the Union, since

all the carpenters were protected under the agreement with V&B, their wages were as specified in the contract and contributions were being made on their behalf to the Trust Fund (Pet. App. D5, D12-D13).

Burgess Construction employed no carpenters of its own from August 1974 until January 1975, at which time it began employing on its own payroll nonunion carpenters to whom it did not apply the terms of the union contract (Pet. App. C5-C6, D4-D5). Employees of Burgess Construction and those of V&B were frequently used on the same job Pet. App. (D16-D17).

In late March 1975 during a routine check of construction projects, the Union discovered nonunion carpenters working at one of Burgess Construction's projects. A follow-up check several days later showed the project using only union carpenters (Pet. App. D14). On May 1, 1975, through another routine check the Union again found nonunion carpenters working at the Burgess Construction jobsite. Thereafter, from May 6 to May 9 the Union picketed the jobsite (Pet. App. C5, D14-D15).

2. On October 15, 1975, the Union filed an unfair labor practices charge against Burgess Construction, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Pet. App. C4, D2). The Board, relying on their interrelated operations, common management, centralized control of labor relations, and common ownership, found that Burgess Construction and V&B were a single employer for purposes of collective bargaining (Pet. App. C2, D9-D12, D16-D19, D21-D24). The Board further found that the carpentry employees of both Burgess Construction and V&B constituted an appropriate unit, on the basis that "all of the employees possess the same skills, perform the same functions, share the same general working conditions, and usually work at

the same sites" (Pet. App. C2). Accordingly, the Board found that the contract between the Union and V&B was equally binding on Burgess Construction, and that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union regarding Burgess Construction's carpenters and by failing to apply the terms of the contract to those employees (Pet. App. D26, C8). The Board also found that the layoff of union carpenters at V&B at the same time that Burgess Construction was hiring nonunion carpenters was discriminatory in violation of Section 8(a)(3) and (1) of the Act (Pet. App. C3-C4).[1]

In finding these violations, the Board rejected petitioners' contention that the six-month limitation period of Section 10(b) of the Act barred consideration of the Union's charge, finding that Burgess Construction had "fraudulently and deceitfully concealed its unlawful employment of nonunion carpenters from the Union by assuring the Union on two occasions that it would no longer employ carpenters. Thus although [petitioner's] conduct began in January 1975, it was not until May 1975 that the Union, through a routine check, discovered that a nonunion crew was being employed by Burgess Construction" (Pet. App. C5). Applying the doctrine that a statute of limitations does not begin to run until the fraud at issue has been discovered, the Board tolled the limitation period of Section 10(b) until May 1975 (*ibid.*).[2]

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[1]Petitioners do not seek review of this finding in their petition.

[2]The Board denied petitioners' motion to reopen the record, made some six-months after the close of the hearing before the administrative law judge, finding that the motion failed to state a sufficient basis for granting the request (Pet. App. C1 n.2).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A2), concluding that "[s]ubstantial evidence" supported the Board's findings that Burgess Construction had fraudulently concealed its employment of nonunion carpenters and that the Union had not discovered it prior to May 1975 (Pet. App. A8, A9-A10). The court noted that "it is clear that fraudulent concealment tolls a statute of limitations" (Pet. App. A7).

The court also found that the record "amply" supported the Board's conclusion that petitioners constituted a single employer (Pet. App. A15), and that the carpenters employed by petitioners showed a community of interest which made it appropriate to include them in a single bargaining unit (Pet. App. A16-A18).

Concerning petitioners' contention that the Board improperly refused to reopen the record, the court noted that "it was [petitioners'] burden to show the materiality of the proffered evidence and why it was not introduced at the hearing. We agree that [petitioners] failed to meet their burden" (Pet. App. A22) (citation omitted).

ARGUMENT

1. Petitioners urge (Pet. 7-8) that the doctrine of fraudulent concealment should not be applied to toll the Section 10(b) statute of limitation. Petitioners cite no precedent for their view; indeed all the applicable precedent is to the contrary. The doctrine of fraudulent concealment is well established in federal law as a broad equitable exception to federal statutes of limitation. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946). This Court has recognized impliedly that this doctrine is applicable to Section 10(b). *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 362

U.S. 411, 429 n.19 (1960).[3] The Board has consistently applied this principle to the limitation period of Section 10(b), holding that the period does not begin to run until the charging party learns of the unlawful acts which would form the basis for an unfair labor practice charge. See, *e.g.*, *Wisconsin River Valley District Council*, 211 N.L.R.B. 222, 227 (1974), enforced 532 F. 2d 47 (7th Cir. 1976), and cases cited therein. The courts of appeals have uniformly sustained the Board in this view. *AMCAR Division, ACF Industries, Inc.* v. *NLRB*, 592 F. 2d 422, 430-431 (8th Cir. 1979); *NLRB* v. *Allied Products Corp., Richard Bros. Div.*, 548 F. 2d 644, 650 (6th Cir. 1977); *NLRB* v. *Shawnee Industries, Inc.*, 333 F. 2d 221, 224 (10th Cir. 1964); *International Ladies Garment Workers Union* v. *NLRB.*, 463 F. 2d 907, 922 (D.C. Cir. 1972).

Petitioners' additional contention that the Union actually knew of the unfair labor practices more than six months prior to the filing of the charge merely contests the Board's contrary finding. That finding was upheld by the court of appeals (Pet. App. A10). Further review of this evidentiary question is not warranted. *Universal Camera Corp.* v. *NLRB.* 340 U.S. 474, 491 (1951).[4]

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[3]There the court concluded that events occurring outside the six-month period of Section 10(b) could not be used to support an unfair labor practice charge based on acts within the Section 10(b) period which, without relying on such anterior events, could not themselves serve as a basis for finding an unfair labor practice. 362 U.S. at 416-419. However, in a concluding footnote the Court noted: "[i]t need hardly be pointed out that we are not dealing with a case of fraudulent concealment alleged to toll the statute." *Id.* at 429 n.19.

[4]Similarly, petitioners' contention (Pet. 10-11) that its motion to reopen the record was improperly denied merely raises the factual issue of whether on this record the Board abused its discretion in denying the motion. The court of appeals "examined the record * * * particularly carefully" and concluded that petitioners had not met their burden of showing materiality or unavailability of the proffered evidence (Pet. App. A22). Its conclusion raises no issue warranting this Court's review.

2. Petitioners do not dispute seriously the Board's findings, upheld by the court of appeals, that Burgess Construction and V&B constitute a single employer.[5] However, petitioners urge that the Board improperly combined the carpenters employed by the two into a single bargaining unit, and that the Board exceeded its authority by ordering Burgess Construction to honor the collective agreement signed by V&B. There is no merit to these contentions.

South Prairie Construction Co. v. *Local 627, Int'l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976), does not aid petitioners. That case, as the court of appeals pointed out (Pet. App. A15-A16), holds that a single employer finding is not determinative of the issue of whether a single bargaining unit is appropriate. Resolution of the latter issue turns on whether the two groups of employees share a community of interests. *Central New Mexico Chapter*, 152 N.L.R.B. 1604, 1608 (1965); *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76, 77 (1977), aff'd *sub. nom. Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 595 F. 2d 844 (D.C. Cir. 1979). Here, the Board did not base its single bargaining unit finding on its single employer finding. Rather, the Board found, and the court

[5]Petitioners do maintain, however, that the Board's application of the single employer doctrine somehow conflicts with principles enunciated in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). There is no conflict. In *H.K. Porter Co.*, this Court held that the Board could not order an employer to include in a collective bargaining agreement a provision which the union could not obtain through bargaining negotiations. Here, Burgess agreed to the terms of the collective bargaining agreement. Thus, the effect of the Board's single employer finding is not, as petitioners' argument suggests, to compel the employer to adhere to a provision for which it did not and could not bargain. Rather, the single employer finding merely holds the employer in all its incarnations to the terms of an agreement it willingly entered into.

of appeals agreed, that the Burgess Construction and V&B carpenters showed the requisite community of interests (Pet. App. C2, A16).[6]

Indeed, petitioners do not appear to dispute the fact that the V&B carpenters and the Burgess Construction carpenters share a community of interests. Instead they contend (Pet. 8-10) that the Burgess Construction carpenters were a new group of employees who could not be accreted properly to the V&B bargaining unit. As the court of appeals explained, the doctrine of accretion is inapplicable here.

> Accretion concerns whether certain employees should be absorbed into an existing unit. The issue here is what constitutes the proper existing unit. [V&B] did not acquire [Burgess Construction] nor did it employ [Burgess Construction] to conduct its operations at a different location. Here a single employer, consisting of [V&B] and [Burgess Construction], merely shifted work from the employees of [V&B] to those of [Burgess Construction]. If the

[6]In *Peter Kiewit Son's, supra*, the Board concluded that the two groups of employees did not constitute an appropriate bargaining unit because "the engineers employed by South Prairie in Oklahoma have a distinct and separate community of interests from the employees of Kiewit * * *" (231 N.L.R.B. at 78). There, the two groups of employees worked on separate projects, were separately supervised, and in part performed different tasks inasmuch as South Prairie was involved solely with highway construction whereas Kiewit also engaged in airport, mill and railroad bridge construction. Such distinguishing factors are not present here.

employees of both constitute an appropriate bargaining unit because of their community of interests, there is no need for the Board to concern itself with accretion.

Pet. App. A16-A17 (footnote omitted).[7]

Petitioners' argument (Pet. 5-7) that the Board's order imposes a contract on Burgess Construction to which it had not agreed ignores the Board's findings that Burgess Construction and V&B were a single integrated enterprise and that the union contract was intended to and did cover all carpenters working for that enterprise (Pet. App. D18-D19, A19). Therefore, it is of no significance that Burgess Construction did not sign the contract, for Don Burgess' signature on behalf of V&B was sufficient to bind both V&B and Burgess Construction as a single employer to the union contract covering all carpenters employed by the enterprise in the unit found appropriate by the Board. Cf. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 259 n.5 (1974) (an employer which is the alter ego of its predecessor "is subject to all the legal and contractual obligations of the predecessor").

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[7]The cases cited by petitioner (Pet. 8-9) involve situations where independently established and distinct units of employees are sought to be combined into a single unit. *Spartans Industries, Inc.* v. *NLRB*, 406 F. 2d 1002 (5th Cir. 1969), involved a merger of companies whose employees were represented by separate unions in separate bargaining units. *NLRB* v. *Masters-Lake Success, Inc.*, 287 F. 2d 35 (2d Cir. 1961); *Local 919, Retail Clerks Int'l Association* v. *NLRB*, 416 F. 2d 1118 (D.C. Cir. 1969); *Sheraton Kauai Corp.* v. *NLRB*, 429 F. 2d 1352 (9th Cir. 1970); and *Pullman Industries, Inc.*, 159 N.L.R.B. 580 (1966), involved accretions of new stores, plants, or hotels to existing units at separate, geographically dispersed locations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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